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Daud bin Arshad & Ors (representing 61 settlers/participants of FELCRA Gugusan Sungai Ara, Mukim Ulu Sungai Sedili, Daerah Kota Tinggi, Johor) v FELCRA Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02(NCVC)(W)-1304–07 OF 2016
TENGKU MAIMUN, NALLINI PATHMANATHAN AND SURAYA OTHMAN JJCA
C 28 DECEMBER 2018

Civil Procedure — Action — Dismissal of action — Plaintiffs filed action against defendant challenging profit and loss accounts of defendant; and distribution of dividends to plaintiffs — Defendant filed application under O 33 rr 2 and 5 of the Rules of Court 2012 — Learned trial judge allowed application — Whether defendant failed to apply for an order first — Whether defendant failed to show the application would result substantial saving of time and expenditure — Whether O 33 r 2 of the Rules of Court 2012 could not be resorted — Whether learned judge erred in failing to consider plaintiffs' cause of action based on fraud and legitimate expectation — Rules of Court 2012 O 33 rr 2 & 5

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The appellants ('the plaintiffs') were former participants/settlers of a scheme known as Rancangan Felcra Sg Ara, Johor Darul Takzim. They commenced a suit against Felcra Bhd ('the defendant') on 24 May 2011, challenging in essence, the profit and loss accounts of the defendant and the distribution of dividends to the plaintiffs. The case proceeded to full trial where ten witnesses for the plaintiffs testified. After the plaintiffs closed their case and after the first witness for the defendant completed his testimony, the defendant filed an application ('encl 68') pursuant to O 33 rr 2 and 5 of the Rules of Court 2012 ('the ROC') for the determination of two issues, namely: (a) whether the plaintiffs' claim was time-barred; and (b) whether the plaintiffs were estopped from filing the suit by reason that they had accepted the impugned accounts as true and correct. The learned judge allowed the defendant's application and dismissed the plaintiffs' claim with costs. Aggrieved, the plaintiffs appealed.

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Held, dismissing the appeal and affirming the order of the learned judge:

(1) The decision of the learned judge was in accord with the provisions of O 33 r 2 of the ROC. Despite the fact that in the instant case trial had proceeded at such an advanced stage, it did not preclude the defendant from filing the said application. The plaintiff's contention that the procedure adopted by the defendant was wrong was of no merit. It was clearly indicated in the learned judge's grounds of judgment that he had

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allowed the defendant to file the application in encl 68. The plaintiff's submission that the defendant failed to show that the application has resulted in substantial saving of time and expenditure could not be accepted as the examination of the defendant's witness took more than two years (see paras 20–21 & 23).

(2) On the issue of limitation, no error of law or fact on the part of the learned judge. His finding was supported by the contemporaneous documents in the form of minutes of the 17th AGM. The dispute between the plaintiffs and the defendant arose in 2004 ie at the 17th AGM when the profit and loss account for the years 2000, 2001 and 2002 were not accepted by the plaintiffs. The plaintiffs' cause of action which was founded on a breach of agreement accrued on 24 May 2004 and it followed that the suit filed in 2011 was barred by limitation. The plaintiffs' reliance on the letter dated 18 April 2006 was misconceived and an afterthought as the plaintiffs had not pleaded this letter in their original statement of claim, nor in their amended statement of claim (see paras 25–26 & 29).

(3) The plaintiffs failed to particularise the facts or allegations of fraud purportedly committed by the defendant. No dates or other specific conduct(s) of the defendant were pleaded to support an action based on fraud. As for legitimate expectation, the doctrine was only applicable to public law matters and not to private law matters (see para 31).

(4) On estoppel, there was no appealable error on the part of the learned judge. The plaintiffs, as correctly decided by the learned judge were estopped from further challenging or disputing the correctness of the profit and loss accounts. The plaintiffs, by the doctrine of estoppel, could not resile from the position they had taken at the 18th AGM (see paras 32 & 34).

(5) Apart from the fact that it was too late in the day for the plaintiffs to challenge that the minutes of the AGMs were not accurate, no basis was found for the plaintiffs to mount such a challenge (see para 35).

(6) No appealable error of law or fact in the findings of the learned judge which were based on the evidence was found, particularly the contemporaneous documentary evidence. No useful purpose would be served to proceed with the trial when the issues of limitation and estoppel as framed by the defendant would dispose of the entire matter against the plaintiffs, rendering the trial of the plaintiffs' claim wholly unnecessary. The contemporaneous documents in the form of the minutes of the 17th AGM and the 18th AGM demolished the plaintiffs' case. In view of the contemporaneous documents, the plaintiffs' contention that their claim involved disputed facts could not be sustained and there was no need to clarify the issues pertaining to the accounts during trial. The

learned judge was therefore correct to dismiss the plaintiffs' claim pursuant to O 33 r 2 and r 5 of the ROC (see paras 37–38).

[Bahasa Malaysia summary

Perayu ('plaintif') adalah bekas peserta/peneroka skim yang dikenali sebagai Rancangan Felcra Sg Ara, Johor Darul Takzim. Mereka memulakan saman terhadap Felcra Bhd ('defendan') pada 24 Mei 2011, mencabar pada dasarnya, akaun untung dan rugi defendan dan pengagihan dividen kepada plaintif. Kes itu diteruskan ke perbicaraan penuh di mana sepuluh orang saksi plaintif memberi keterangan. Selepas plaintif menutup kes mereka dan selepas saksi pertama defendan selesai dengan keterangannya, defendan memfailkan permohonan ('lampiran 68') menurut A 33 kk 2 dan 5 Kaedah-Kaedah Mahkamah 2012 ('KKM') untuk penentuan dua isu, iaitu: (a) sama ada tuntutan plaintif telah dihalang masa; dan (b) sama ada plaintif telah dihalang daripada memfailkan saman dengan alasan bahawa mereka telah menerima akaun yang disyaki sebagai benar dan betul. Hakim yang bijaksana membenarkan permohonan defendan dan menolak tuntutan plaintif dengan kos. Terkilan, plaintif merayu.

Diputuskan, menolak rayuan dan mengesahkan perintah hakim yang bijaksana:

(1) Keputusan hakim yang bijaksana adalah selaras dengan peruntukan A 33 k 2 KKM. Walaupun hakikat bahawa dalam perbicaraan kes ketika ini telah dijalankan pada tahap yang lebih lanjut, ia tidak menghalang defendan daripada memfailkan permohonan tersebut. Pandangan plaintif bahawa prosedur yang diterima pakai oleh defendan adalah salah adalah tidak bermerit. Ia jelas dinyatakan dalam alasan hakim yang bijaksana bahawa beliau telah membenarkan defendan memfailkan permohonan dalam lampiran 68. Hujahan plaintif bahawa defendan gagal menunjukkan bahawa permohonan itu telah menyebabkan penjimatan masa dan perbelanjaan yang besar tidak dapat diterima kerana pemeriksaan saksi defendan mengambil masa lebih daripada dua tahun (lihat perenggan 20–21 & 23).

(2) Mengenai isu limitasi, tiada kesilapan undang-undang atau fakta di pihak hakim yang bijaksana. Dapatannya disokong oleh dokumen-dokumen sedia ada dalam bentuk minit AGM ke-17. Pertikaian antara plaintif dan defendan timbul pada tahun 2004 iaitu pada AGM ke-17 apabila akaun untung dan rugi tahun 2000, 2001 dan 2002 tidak diterima oleh plaintif. Tindakan plaintif yang diasaskan atas perlanggaran perjanjian yang terakru pada 24 Mei 2004 dan diikuti bahawa saman yang difailkan pada tahun 2011 telah dihalang oleh had masa. Kebergantungan plaintif terhadap surat bertarikh 18 April 2006 adalah salah faham dan sesuatu yang difikirkan kemudian kerana plaintif tidak mengaku surat ini dalam pernyataan tuntutan asal mereka, atau

dalam pernyataan tuntutan yang dipinda (lihat perenggan 25–26 & 29).

(3) Plaintif gagal mengkhususkan fakta atau tuduhan penipuan yang kononnya dilakukan oleh defendan. Tiada tarikh atau tindakan khusus defendan telah diplid untuk menyokong tindakan berdasarkan penipuan. Bagi jangkaan sah, doktrin itu hanya terpakai kepada perkara undang-undang awam dan bukan untuk perkara undang-undang persendirian (lihat perenggan 31).

(4) Berkaitan estoppel, tidak ada kesilapan rayuan di pihak hakim yang bijaksana. Plaintif, sebagaimana yang diputuskan oleh hakim yang bijaksana dengan betul, dihalang daripada mencabar atau membantah ketepatan akaun keuntungan dan kerugian. Plaintif, dengan doktrin estoppel, tidak dapat bingkas dari kedudukan yang mereka ambil pada AGM ke-18 (lihat perenggan 32 & 34).

(5) Selain daripada fakta bahawa sudah terlambat bagi plaintif untuk mencabar bahawa minit AGM adalah tidak tepat, tiada dasar yang didapati bagi plaintif untuk memulakan cabaran sedemikian (lihat perenggan 35).

(6) Tidak ada kesilapan rayuan undang-undang atau fakta dalam penemuan hakim yang bijaksana yang berdasarkan keterangan telah dijumpai, khususnya bukti dokumen-dokumen sedia. Tiada maksud berfaedah akan disampaikan untuk meneruskan perbicaraan apabila isu-isu limitasi dan estoppel yang dirumuskan oleh defendan akan melupuskan keseluruhan perkara terhadap plaintif, menyebabkan perbicaraan tuntutan plaintif tidak perlu sepenuhnya. Dokumen-dokumen sedia ada dalam bentuk minit AGM ke-17 dan AGM ke-18 menghancurkan kes plaintif. Berkenaan dokumen-dokumen sedia ada itu, pernyataan plaintif bahawa tuntutan mereka berkaitan fakta yang dipertikaikan tidak dapat dikekalkan dan tidak perlu untuk menjelaskan isu-isu berkaitan akaun semasa perbicaraan. Oleh itu hakim yang bijaksana adalah betul untuk menolak tuntutan plaintif berdasarkan A 33 k 2 dan k 5 KKM (lihat perenggan 37–38).]

Notes

For cases on dismissal of action, see 2(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 156–171.

Cases referred to

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Berhad [1995] 3 MLJ 331; [1995] 1 MLRA 738, FC (refd)

Credit Corporation (M) Bhd v Fong Tak Sin [1991] 1 MLJ 409; [1991] 1 CLJ Rep 69, SC (refd)

Darahman bin Ibrahim & Ors v Majlis Mesyuarat Kerajaan Negeri Perlis & Ors [2008] 4 MLJ 309; [2008] 1 MLRA 411, CA (refd)

Dayapi Holdings Sdn Bhd & Anor v Arab-Malaysian Finance Bhd & Anor [2009] 7 MLJ 627; [2008] 3 MLRH 328, HC (refd)
Dominic J Puthucheary v Jet Age Construction Sdn Bhd & Anor and Module Construction Sdn Bhd & Ors v Jet Age Construction Sdn Bhd & Anor [1997] 2 MLJ 252, CA (refd)
Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441; [2015] 2 CLJ 453, FC (refd)
GPQ Sdn Bhd v Constant View Sdn Bhd [2017] 6 MLJ 728; [2017] 4 MLRA 483, CA (refd)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)
Krishnan Rajan a/l N Krishnan v Bank Negara Malaysia & Ors [2003] 1 MLJ 149, HC (refd)
Nasri v Mesah [1971] 1 MLJ 32, FC (refd)
Newacres Sdn Bhd v Sri Alam Sdn Bhd [1991] 3 MLJ 474, SC (refd)
Savant-Asia Sdn Bhd v Sunway PMI-Pile Construction Sdn Bhd [2007] 7 MLJ 706, CA (refd)
Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395, CA (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (refd)
Watt or Thomas v Thomas [1947] AC 484, HL (refd)

Legislation referred to

Limitation Act 1953 s 6(1)(a)
Rules of Court 2012 O 33 rr 2, 5, O 92 r 4
Rules of the High Court 1980 O 33 r 2

Appeal from: Civil Suit No NCVC23–90 of 2011 (High Court, Johor Bahru)

Bernard George (Mathews George with him) (Tay, Bernard & Cheong) for the appellants.
Helmi bin Hamzah (Mohd Rosly Khady with him) (Hisham, Sobri & Kadir) for the respondent.

Tengku Maimun JCA (delivering judgment of the court):

THE FACTS

[1] The appellants ('the plaintiffs') are former participants/settlers of a scheme known as Rancangan Felcra Sg Ara, Johor Darul Takzim. They commenced a suit against Felcra Bhd ('the defendant') on 24 May 2011, challenging in essence, the profit and loss accounts of the defendant and the distribution of dividends to the plaintiffs. The plaintiffs sought, inter alia, for the following reliefs:

(a) accounts and inquiries;

(b) inspection of the defendant's financial records; and

(c) damages (to be assessed).

[2] The case proceeded to full trial where ten witnesses for the plaintiffs testified. After the plaintiffs closed their case and after the first witness for the defendant completed his testimony, the defendant filed an application (encl 68) pursuant to O 33 rr 2 and 5 of the Rules of Court 2012 ('the ROC') for the determination of two issues, namely:

(a) whether the plaintiffs' claim was time-barred; and

(b) whether the plaintiffs were estopped from filing the suit by reason that they had accepted the impugned accounts as true and correct.

[3] In support of its application in encl 68, the defendant through its legal officer, made, inter alia, the following averments:

> 20. Saya menyatakan bahawa Defendan memfailkan Permohonan Defendan ini sekarang kerana:
>
> (a) 10 saksi Plaintif telah memberikan keterangan di dalam perbicaraan penuh dari 18.7.2012 sehingga 18.10.2013;
>
> (b) 1 saksi Defendan telah memberikan keterangan di dalam perbicaraan penuh dari 16.1.2014 sehingga 19.5.2016;
>
> (c) Plaintif-Plaintif telah mengesahkan wujudnya perkara-perkara berikut:
>
> (i) Mesyuarat Agong Felcra Sg. Ara Kali ke-17 diadakan pada 6.5.2004;
>
> (ii) Mesyuarat Agong Felcra Sg. Ara Kali ke 18 diadakan pada 29.8.2006;
>
> (iii) Peserta-peserta Felcra Sg. Ara telah dengan sebulat suara mempertikaikan penyata-penyata P&L termasuk dan tidak terhad kepada pembahagian dividen pada Mesyuarat Agong Felcra Sg. Ara Kali Ke-17; dan
>
> (iv) Peserta-peserta Felcra Sg. Ara telah dengan sebulat suara menerima semua P&L termasuk dan tidak terhad kepada pembahagian dividen semasa Mesyuarat Agong Felcra Sg. Ara Kali Ke-18;
>
> (d) saksi Defendan yang pertama iaitu Encik Khalid Md. Lip yang juga merupakan Ketua Peserta Felcra Sg. Ara juga telah mengesahkan wujudnya perkara-perkara berikut:
>
> (i) Mesyuarat Agong Felcra Sg. Ara Kali Ke-17 diadakan pada 6.5.2004;
>
> (ii) Mesyuarat Agong Felcra Sg. Ara Kali Ke-18 diadakan pada 29.8.2006;

(iii) Peserta-peserta Felcra Sg. Ara telah dengan sebulat suara mempertikaikan penyata-penyata P&L termasuk dan tidak terhad kepada pembahagian dividen pada Mesyuarat Agong Felcra Sg. Ara Kali Ke-17; dan

(iv) Peserta-peserta Felcra Sg. Ara telah dengan sebulat suara menerima semua P&L termasuk dan tidak terhad kepada pembahagian dividen semasa Mesyuarat Agong Felcra Sg. Ara Kali Ke-18;

(e) setelah pengesahan di atas dibuat oleh Plaintif dan Defendan, maka sewajarnya tindakan ini ditolak bagi mengelakkan penyalahgunaan proses Mahkamah secara berterusan oleh Plaintif-Plaintif; dan

(f) penolakan tindakan ini juga akan dapat menjimatkan kos pihak-pihak dan masa semua pihak terutamanya Mahkamah Yang Mulia ini memandangkan tindakan ini sudah berusia 6 tahun semenjak ia difailkan pada 24.5.2011.

21. Saya menyatakan bahawa faktor-faktor di atas menjusitifikasikan Permohonan Defendan ini.

FINDINGS OF THE HIGH COURT

[4] The learned judge allowed the defendant's application and in so deciding, His Lordship relied on *Dayapi Holdings Sdn Bhd & Anor v Arab-Malaysian Finance Bhd & Anor* [2009] 7 MLJ 627; [2008] 3 MLRH 328. The learned judge had also referred to the *Malaysian Civil Procedure 2015 Vol 1* which states the following on the application of O 33 rr 2 and 5:

> Advanced stage of trial proceedings: When the proceeding has reached such an advanced stage of the proceeding or had practically reached the trial stage, the appropriate course to adopt, should any party be of view that the cause could be disposed of without the need of a normal trial, is not to invoke Order 14A, but to invoke Order 33 r 2, r 3(2) and r 5 (see *Dayapi Holdings Sdn Bhd & Anor v Arab-Malaysian Finance Bhd & Anor* [2009] 7 MLJ 627; [2009] 1 AMR 336 at 642).
>
> In *Karen Isabel Wilfred v Dhyana Shila Vasanthan* [2014] AMEJ 0185; [2014] 4 CLJ 737, the court held that the issue of delay is not a crucial matter to consider in an application under Order 33 r 2 as the provision allows the court to consider the question or issue to be tried before, at or after trial of the cause of matter. The court further held that the pertinent and crucial factor to consider is whether the trial of the preliminary issue will result in a substantial saving of time and expenditure.

[5] Guided by the above authorities, the learned judge held that there were basis in the defendant's application under O 33 rr 2 and 5. His Lordship then proceeded to deal with the issues of limitation and estoppel as follows.

[6] On limitation, the learned judge noted that the plaintiffs had challenged,

inter alia, the agreement that they had entered into with the State Government of Johor; the payment of dividends and the defendant's profit and loss accounts. His Lordship found that these complaints were raised by the plaintiffs at the 17th Annual General Meeting of Felcra Sg Ara ('the 17th AGM') on 6 May 2004.

[7] The learned judge held that the cause of action accrued on 6 May 2004 and that the plaintiffs were barred by limitation under s 6(1)(a) of the Limitation Act 1953 which provides, inter alia, that an action founded on a contract shall not be brought after the expiration of six years from the date on which the cause of action accrued. The plaintiffs filed the instant suit on 24 May 2011 ie more than seven years after the cause of action had accrued.

[8] The learned judge further found that the plaintiffs' claim was also premised on the profit and loss accounts of Felcra Bhd Sg Ara and as such, s 6(2) of the Limitation Act 1953 applies which similarly provides for a six year limitation period.

[9] On the issue of estoppel, the learned judge found that after the profit and loss account for the years 2000, 2001 and 2002 were unanimously rejected by the plaintiffs, it was resolved at the 17th AGM that a Profit and Loss Review Committee be established to review the correctness of the profit and loss accounts.

[10] His Lordship made a finding that the Profit and Loss Review Committee was in fact established and that at the 18th Annual General Meeting of Felcra Sg Ara ('the 18th AGM'), the profit and loss account for the years 2000 until June 2006 were unanimously accepted by the plaintiffs. Applying the principles in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Berhad* [1995] 3 MLJ 331; [1995] 1 MLRA 738, the learned judge held that the plaintiffs were estopped from challenging the accounts of Felcra Bhd Sg Ara.

[11] Having resolved the two issues against the plaintiffs, the learned judge dismissed the plaintiffs' claim with costs. Aggrieved, the plaintiffs appealed to this court. We heard the appeal and had unanimously dismissed the same. We now provide our reasons.

THE APPEAL

[12] In summary, learned counsel for the plaintiffs submitted that:

(a) the application by the defendant was made in bad faith as there was inordinate delay and that the defendant wanted to avoid cross examination of its witnesses;

(b) the defendant has failed to apply for an order under r 2 first before seeking the court's directions as to the manner in which the question or issue is to be stated;

(c) the defendant has failed to show that the application would result in a substantial saving of time and expenditure;

(d) O 33 r 2 of the ROC cannot be resorted to as the plaintiffs' claim involved disputed facts; and

(e) the learned judge erred in failing to consider that the plaintiffs' cause of action was not based purely on the veracity of the defendant's financial accounts but also on fraud and on doctrine of legitimate expectation.

[13] In support of his submission, learned counsel for the plaintiffs cited *Dominic J Puthucheary v Jet Age Construction Sdn Bhd & Anor and Module Construction Sdn Bhd & Ors v Jet Age Construction Sdn Bhd & Anor* [1997] 2 MLJ 252; *Savant-Asia Sdn Bhd v Sunway PMI-Pile Construction Sdn Bhd* [2007] 7 MLJ 706; *Krishnan Rajan a/l N Krishnan v Bank Negara Malaysia & Ors* [2003] 1 MLJ 149 and *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [1991] 3 MLJ 474.

[14] In reply, it was submitted for the defendant that encl 68 was correctly filed under O 33 rr 2 and 5 and/or under O 92 r 4 of the ROC; that based on the authorities, the plaintiffs are time-barred from challenging any accounts prior to 2005; and that based on the plaintiffs' own admission and agreement to accept the financial accounts of Felda Bhd Sg Ara as correct, the plaintiffs are now estopped from commencing the instant suit.

OUR DECISION

[15] The principles on appellate intervention are trite, namely that an appellate court has a duty to intervene only where the trial court was plainly wrong or has so fundamentally misdirected itself that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion (see *Watt or Thomas v Thomas* [1947] AC 484; *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395; *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441; [2015] 2 CLJ 453).

[16] We had examined the decision of the learned judge with the above

principles in mind, and we were not satisfied that His Lordship was plainly wrong in allowing the defendant's application pursuant to O 33 rr 2 and 5 of the ROC.

[17] O 33 r 2 of the ROC reads:

> 2 Time of trial of questions or issues (O 33 r 2)
>
> The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.

[18] Whereas O 33 r 5 provides:

> 5 Dismissal of action after decision of preliminary issue (O 33 r 5)
>
> If it appears to the Court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such order or give such judgment therein as may be just.

[19] In the instant appeal, the plaintiffs argued that the learned judge ought not to have allowed the defendant's application by reason of the inordinate delay. Having considered the provisions of O 33 rr 2 and 5 and the relevant authorities, His Lordship disagreed with the plaintiffs.

[20] The decision of the learned judge was in accord with the provisions of O 33 r 2 which expressly state that the application may be made either before, at or after the trial. Despite the fact that in the instant case trial had proceeded at such an advanced stage, with the plaintiffs' witnesses having completed their testimony and the defendant's first witness had also been examined, it did not preclude the defendant from filing the said application. In this regard, the issue of bad faith as contended by the plaintiffs did not arise, given that the law allows such an application to be made.

[21] The plaintiffs contended that the procedure adopted by the defendant was wrong in the sense that the defendant must apply for an order under r 2 first before seeking the court's direction as to the manner in which the question or issue is to be stated. We found no merits in the plaintiffs' contention. It was clearly indicated in the learned judge's grounds of judgment that he had allowed the defendant to file the application in encl 68, where His Lordship stated that:

> [8] Pada 24.5.2016 Defendan telah membuat permohonan kepada Mahkamah ini untuk memfailkan Permohonan Defendan. Mahkamah telah membenarkan Defendan untuk memfailkan Permohonan Defendan dan seterusnya menetapkan

16.6.2016 sebagai tarikh pendengaran Permohonan Defendan tersebut.

[22] As to the appropriateness of the application, we echo the words of Mohd Hishamudin Yunus J (as he then was) in *Dayapi Holdings*, where His Lordship said at p 341:

> In my judgment, when the proceeding has reached such an advanced stage of the proceeding or had practically reached the trial stage, as has happened in the present case, the appropriate course to adopt, should any party be of view that the cause could be disposed of without the need of a normal trial, is not to invoke O 14A, but to invoke O 33 rr 2 and 5 of the RHC.

[23] Learned counsel for the plaintiffs had submitted that the defendant failed to show that the application has resulted in substantial saving of time and expenditure. We were unable to accept the submission. As evident from the records, the trial of this matter took place from July 2012–May 2016 with ten witnesses testifying for the plaintiffs and one for the defendant. The examination of the defendant's witness took more than two years ie from January 2014–May 2016. In the circumstances, we found no reason to depart from His Lordship's conclusion that:

> (ix) Lagipun Mahkamah amati penolakan tindakan ini dapat menjimatkan kos pihak-pihak dan masa semua pihak memandangkan ia sudah terlampau lama sejak difailkan pada 24.5.2011.

[24] Obviously when the learned judge decided on encl 68, the entire matter was disposed of and parties were spared from the rigmarole of the trial process for the defendant's other witnesses to testify.

[25] On the issue of limitation, the learned judge found that the plaintiffs' cause of action accrued in May 2005 when the plaintiffs through one Hamzah bin Abu Bakar raised the complaints on, inter alia,the financial statements or the profit and loss account at the 17th AGM held on 24 May 2004. We found no error of law or fact on the part of the learned judge. His finding was supported by the contemporaneous documents in the form of minutes of the 17th AGM, which recorded the following:

> AGENDA 2
>
> UCAPAN KETUA PESERTA
>
> *En. Hamzah bin Abu Bakar*
>
> ...
>
> 2.4 Setelah di koperatkan beliau mempertikaikan perjanjian Felcra Berhad dengan Kerajaan Negeri, Potongan Felcra Holding, Penyata Hutang (P&L) yang mengelirukan dan perbelanjaan baja yang tinggi.

...

2.6 Beliau juga mempertikaikan kaedah bayaran dividen bulanan walaupun harga sawit meningkat, peserta masih mendapat dividen kurang dari apa yang dikehendaki.

[26] We agreed with the learned judge that the dispute between the plaintiffs and the defendant arose in 2004 ie at the 17th AGM when the profit and loss account for the years 2000, 2001 and 2002 were not accepted by the plaintiffs. At the said AGM, the plaintiffs had also raised the issue of payment of dividends. When the plaintiffs raised the complaints in respect of the profit and loss accounts and the dividends in the 17th AGM held on 24 May 2006 that was the earliest time at which an action could be brought against the defendant. As such, the plaintiffs' cause of action which was founded on a breach of agreement accrued on 24 May 2004 and it follows that the suit filed in 2011 was barred by limitation.

[27] In *Nasri v Mesah* [1971] 1 MLJ 32, Gill FJ said at p 34:

A 'cause of action' is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (per Lord Esher MR in *Read v Brown*. In *Reeves v Butcher* Lindley LJ said:

'This expression, 'cause of action', has been repeatedly the subject of decision, and it has been held, particularly in *Hemp v Garland*, decided in 1843, that the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought.

[28] Support can also be found in the case of *Credit Corporation (M) Bhd v Fong Tak Sin* [1991] 1 MLJ 409; [1991] 1 CLJ Rep 69 where the Supreme Court said at p 76:

... a cause of action is said to have accrued when there is in existence a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed.

[29] In submitting that the learned judge erred in his finding on limitation, the plaintiffs sought to rely on the defendant's letter dated 18 April 2006 to the plaintiffs/participants of Felcra Sg Ara. The caption of the letter reads: *Pengesahan Selesai Hutang Projek Felcra Berhad Sg Ara I, II & III Pemakluman Kedudukan Kewangan Peserta*. The plaintiffs contended that in light of this letter, the plaintiffs' claim was not time-barred. We found that the plaintiffs' reliance on the letter dated 18 April 2006 was misconceived and an afterthought as the plaintiffs had not pleaded this letter in their original

statement of claim, nor in their amended statement of claim.

[30] The plaintiffs had also submitted that the learned judge erred in failing to consider that the plaintiffs' cause of action was not based purely on the veracity of the defendant's financial accounts but also on fraud and on doctrine of legitimate expectation.

[31] Insofar as fraud was concerned, it is trite that the plaintiffs must plead the particulars of fraud. However, apart from the too general averments made in para 11 of the amended statement of claim, the plaintiffs failed to particularise the facts or allegations of fraud purportedly committed by the defendant. No dates or other specific conduct(s) of the defendant were pleaded to support an action based on fraud. As for legitimate expectation, the doctrine was only applicable to public law matters and not to private law matters (see *GPQ Sdn Bhd v Constant View Sdn Bhd* [2017] 6 MLJ 728; [2017] 4 MLRA 483. See also *Darahman bin Ibrahim & Ors v Majlis Mesyuarat Kerajaan Negeri Perlis & Ors* [2008] 4 MLJ 309; [2008] 1 MLRA 411). As such, the plaintiffs could not rely on the purported claim premised on fraud and legitimate expectation. The plaintiffs were therefore left with only the cause of action for breach of contract and/or accounts and in this regard, the plaintiffs were clearly out of time in commencing the instant suit.

[32] On estoppel, we likewise found no appealable error on the part of the learned judge. Consequent to the issues raised by Hamzah bin Abu Bakar at the 17th AGM, all the participants of Felcra Sg Ara voted against the passing of the profit and loss account for the years 2000, 2001 and 2002. The unanimous rejection was evident by the following minutes of the 17th AGM:

> AGENDA 8
>
> *MEMBENTANGKAN DAN MENERIMA PENYATA P&L 2000, 2001 & 2002 (Pindaan)*
>
> 8.1 Pengurus Kawasan telah membentangkan penyata P&L Sg. Ara I, II dan III bagi tahun 2000, 2001 & 2002 (Pindaan). En. Azis bin Abdul Rahman mencadangkan agar penyata tidak diterima dan disokong oleh Hj. Md. Zin bin Sani dengan sebulat suara.

[33] After the unanimous rejection of the profit and loss account for the years 2000, 2001 and 2002, it was resolved at the 17th AGM that a Profit and Loss Review Committee be established to review the accounts. The learned judge's finding as reproduced below was consistent with the minutes of the 17th AGM:

> (i) ... Perkara ini diputuskan secara sebulat suara pada 6.5.2004 dan ia direkodkan di dalam Bil. 3 Keputusan Mesyuarat Agong Peserta Felcra Sg.

Ara Kali Ke-17 pada 6.5.2004 seperti berikut:

Mesyuarat Agong dengan sebulat suara dipersetujui oleh peserta yang hadir, sebuah Jawatankuasa Semakan P & L ditubuhkan dengan melibatkan NGO. Jawatankuasa ini mempunyai ahli yang tetap bagi tujuan pemahaman masa [*masalah*] yang berbangkit dalam P & L.

(ii) '*Profit and Loss Review Committee*' telah ditubuhkan dan menjalankan tugas-tugas yang diamanahkan.

(iii) Pada 29.8.2006 Plaintif dan peserta-peserta Felcra Sg. Ara yang lain telah mengadakan Mesyuarat Agong Kali Ke-18 dan bersetuju untuk meluluskan Agenda 8 iaitu menerimapakai P & L 2000, 2001, 2002, 2003, 2004, 2005 dan Jun 2006 di dalam Mesyuarat Agong Kali Ke-18 tersebut. Agenda 8 Minit Mesyuarat Agong Kali Ke-18 merekodkan seperti berikut:

Agenda 8

Membentangkan Dan Menerima Penyata P & L 2000, 2001, 2002, 2003, 2004, 2005 dan Jun 2006.

8.1 Pen. Eksekutif Kanan telah membentangkan P & L Sg. Ara I, II dan III bagi tahun 2000, 2001, 2002, 2003, 2004, 2005 dan Jun 2006. En. Bakahruddin bin Abd. Rahman mencadangkan agar penyata P & L tersebut diterima dan disokong oleh En. Hudzen bin Deni dengan sebulat suara.

(iv) Senarai nama kehadiran Plaintif adalah di no: 47 (Plaintif Ke-4); no: 102 (Plaintif Ke-3); no: 119 (Plaintif Ke-2) dan no: 163 (Plaintif Pertama) di muka surat 93-96 dalam Eksibit 'FB-6' di Afidavit Defendan No:1.

(v) Jadi berasaskan fakta-fakta yang dinyatakan sebelum ini, maka wajarlah Plaintif ini dihalang ('*estopped*') daripada mempertikaikan kesahihan mana- mana akaun kewangan Felcra Berhad Sg. Ara tersebut selaras atau sejajar dengan keputusan Mahkamah Persekutuan di dalam kes *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Berhad* [1995] 3 MLJ 331; [1995] 1 MLRA 738 ...

[34] Having disputed or challenged the Profit and Loss account for the years 2000, 2001 and 2002 at the 17th AGM; having resolved to establish a Profit and Loss Review Committee to review the accounts; having established such a committee and having accepted the Profit and Loss account for the years 2000 until June 2006 at the 18th AGM, the plaintiffs, as correctly decided by the learned judge were estopped from further challenging or disputing the correctness of the profit and loss accounts. The plaintiffs, by the doctrine of estoppel, cannot resile from the position they had taken at the 18th AGM.

[35] It was submitted for the plaintiffs that the minutes of the AGMs were not accurate. Quite apart from the fact that it was too late in the day for the

plaintiffs to challenge the minutes, we found no basis for the plaintiffs to mount such a challenge. In any event, it is quite trite that when an oral evidence openly clashed with contemporaneous documentary evidence, it is safer to rely on the contemporaneous documentary evidence (see *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229).

[36] For completeness, we wish to state that the instant appeal was in sharp contrast with the case of *Dominic Puthucheary* cited by learned counsel for the plaintiffs. In *Dominic Puthucheary*, the respondents/plaintiffs, claiming as beneficial owners of a piece of land, brought an action against the appellants/defendants for loss and damage as a result of the defendants wrongfully and without reasonable cause caveating the land and for wrongfully and maliciously conspiring to defraud and to injure the first plaintiff. The action was finally set down for trial but prior to the trial date, the defendants applied under O 33 r 2 of the Rules of the High Court 1980 to determine certain preliminary issues. The trial judge dismissed the application. On appeal to this court, the decision of the trial judge was affirmed. Abu Mansor JCA said at p 264:

> ... we fail to find any error that would justify us, in law, interfering with his decision. We find we are with the respondent in their submission that the appellants have failed to satisfy the court that the application, if allowed, will result in a substantial saving of time and expenditure, and we say that it is true that the several questions or issues raised need to be clarified by evidence and as such cannot be considered to be preliminary points and ordered to be tried as such.

CONCLUSION

[37] We found no appealable error of law or fact in the findings of the learned judge which were based on the evidence, particularly the contemporaneous documentary evidence. In our judgment, no useful purpose would be served to proceed with the trial when the issues of limitation and estoppel as framed by the defendant would dispose of the entire matter against the plaintiffs, rendering the trial of the plaintiffs' claim wholly unnecessary.

[38] The contemporaneous documents in the form of the minutes of the 17th AGM and the 18th AGM demolished the plaintiffs' case. In view of the contemporaneous documents, the plaintiffs' contention that their claim involved disputed facts cannot be sustained and there was no need to clarify the issues pertaining to the accounts during trial. The learned judge was therefore correct to dismiss the plaintiffs' claim pursuant to O 33 rr 2 and 5 of the ROC. In the circumstances, we unanimously dismissed the appeal with no order as to costs. The order of the learned judge was affirmed.

Appeal dismissed and order of learned judge affirmed.

Reported by Nabilah Syahida Abdullah Salleh